UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOEL BOLDEN, et al.,	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action No.**
	:	**99-1255 (GK)**
J & R INCORPORATED, et al.,	:	
Defendants.	:	
	:	

MEMORANDUM OPINION

This matter is before the Court on Defendant J & R Incorporated's Motion for Judgment and Motion to Amend or Alter Judgment [#32]. Upon consideration of the motion, opposition, reply, and the entire record herein, for the reasons stated below, Defendant's Motion is **denied**.

I. Background

Plaintiffs, Joel Bolden and Len Silva, sued Defendant Muhammad Mehmood, a cab driver, and J & R Incorporated, a cab company, under 42 U.S.C. § 1981, the District of Columbia Human Rights Act, D.C. Code § 1-2519, and local common law for discrimination in the provision of taxicab service. The facts of this case are detailed in the Court's Memorandum Opinion of May 3, 2000, and will not be repeated herein. On June 21, 2000, a jury returned a verdict in favor of Plaintiffs on their race discrimination claims, awarding each Plaintiff $6,000 in compensatory damages and $45,000 in punitive damages against J & R. J & R now moves for renewed judgment notwithstanding the verdict ("judgment n.o.v.") and to amend or alter the judgment.

II. Standard of Review

A renewed motion for judgment under Fed. R. Civ. P. 50 need not be granted unless the evidence and inferences reasonably drawn therefrom are so one-sided that reasonable jurors could not disagree on the verdict. See Vander Zee v. Karabatsos, 589 F.2d 723, 726 (D.C. Cir. 1978). In considering a motion for judgment, the evidence must be viewed "in the light most favorable to [plaintiffs] . . ., giving them the advantage of every fair and reasonable inference that the evidence may justify." See Carter v. Duncan-Huggins, 727 F.2d 1225, 1227 (D.C. Cir. 1984).

Under Fed. R. Civ. P. 59(e), a court need not grant a motion to alter or amend a judgment unless it finds that there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Firestone v. Firestone, 76 F.3d 1205 (D.C. Cir. 1996)(citing Nat'l Trust v. Dept. of State, 834 F.Supp. 453, 455 (D.D.C. 1993)(additional citations omitted).

III. Analysis

A. J & R's Arguments are Waived.

J & R failed to raise the majority of the foregoing arguments until after the jury's verdict in its Renewed Motion for Judgment and Motion to Amend or Alter Judgment. In fact, most of J & R's objections appear for the first time in its reply brief after new counsel took

over the case.

Ordinarily, arguments not raised prior to the jury's verdict, such as in a motion for directed verdict or otherwise, are waived. See e.g., Whelan v. Abell, 48 F.3d 1246, 1251 (D.C. Cir. 1995)(arguments not a part of a motion for directed verdict cannot form basis of judgment n.o.v.); Kattan v. District of Columbia, 995 F.2d 274, 276 (D.C. Cir. 1993) (motion to alter or amend judgment does not permit court to consider theories which could have been raised earlier). The purpose of this rule is to ensure that parties have made the most persuasive case possible, to cure any deficiencies therein, and to prevent unfair surprise after a matter has been submitted to a jury.

With the exception of J & R's challenge to the actual amount of the punitive damages award, all of J & R's arguments could have been raised earlier.[1] J & R never challenged Plaintiffs' request for punitive damages or their theory of vicarious liability, despite ample opportunity to do so. J & R did not raise these arguments in its Answer, in a motion for summary judgment, in pre-trial submissions, during the jury instruction conference, in its motion for directed verdict, or at any time prior to the verdict. At the very least,

[1] Defendant argues that it objected to the estoppel issue in a status call held four months prior to trial on February 15, 2000. See Def.'s Response to Pl.'s Sur-Reply at 3. During the status call, J & R indicated that it intended to file a dispositive motion that, among other things, contested Plaintiff's estoppel theory. However, J & R never filed its motion; nor did it raise the estoppel issue thereafter. Accordingly, the Court considers it abandoned.

objections to the instructions on punitive damages and on applicability of Rhone should have been presented at the jury instruction conference or subsequently, in J & R's motion for directed verdict. Fed. R. Civ. P. 51 ("[n]o party may assign as error the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection"); see also Whelan, 48 F.3d at 1251.

Given that J & R waited until the eleventh hour to raise a panoply of objections that could have been raised on numerous occasions prior to the jury's verdict, the Court concludes that J & R's arguments are waived. However, in the interest of judicial economy, the Court will briefly address the merits of these arguments below.

B. J & R is Estopped from Denying Vicarious Liability.

Ordinarily, a plaintiff must prove an employer-employee relationship before a company can be held vicariously liable for the conduct of its employees. Under Rhone v. Try Me Cab Co., 65 F.2d 834 (D.C. Cir. 1933), there is an exception to this requirement, namely that a taxicab company is estopped from denying vicarious liability when one of its drivers injures a passenger, and when the taxicab bears the company's colors and markings. J & R argues that Rhone does not apply unless a plaintiff specifically relies on the colors or markings of a particular cab company in attempting to contract for its services.

Rhone and its progeny make clear that when passengers hail cabs

from a curbside, pre-selection of a particular cab company based on its colors or markings is not required. See e.g., Tarman v. Southard, 205 F.2d 705 (D.C. Cir. 1953). Thus, as long as a curb-side passenger seeking cab services hails a cab that is authorized to bear a company's colors or insignia, a company may be held vicariously liable. See Floyd-Mayers v. American Cab Co., 732 F.Supp. 243, 244 (D.D.C. 1990)(vicarious liability applies to hold company responsible for injuries to passenger in cab bearing its colors regardless of ownership of cab); Marchetti v. Olyowski, 181 F.2d 285, 218 (D.C. Cir. 1950)(vicarious liability not applicable because cab was unauthorized to bear company name).

It is undisputed that Mehmood was driving a cab bearing J & R's colors and markings and that J & R had authorized Mehmood to do so. Plaintiffs, who hailed a J & R cab from the curb, relied on its colors and markings insofar as they thought they were entering a taxicab and contracting for taxicab service.

The law does not also require Plaintiffs to show the special kind of reliance Defendant claims is necessary (i.e., that Plaintiffs relied on J & R's colors to hail a J & R cab in particular). Under Defendant's view, for example, Plaintiffs could not recover from J & R unless they proved that the only cab they were seeking to hail was a J & R cab, and that they would reject all other approaching cabs; or unless, they proved that they hailed a J & R cab to contract for its services only because of a prior knowledge of and reliance on J & R's

reputation. If this were true, the result would be that companies deriving substantial revenues from licensing their colors and tradenames to drivers on a weekly basis would almost always escape responsibility for the conduct of those drivers. See Rhone 65 F.2d at 836 (public policy concern of taxicab companies' lack of financial accountability justifies vicarious liability).

Accordingly, the Court concludes that Rhone applies to hold J & R vicariously responsible for Defendant Mehmood's conduct.[2]

C. Mehmood Acted within the Scope of His Employment.

Even if Rhone applies, J & R argues that it still cannot be held vicariously liable because Mehmood did not act within the scope of his employment on the night of May 25, 1998. See Floyd-Mayers 732, F. Supp. at 245 (employer is only vicariously liable if employee acts within the scope of her employment). Conduct is within the scope of employment if it is executed in part to further a person's business or is sufficiently related to her employment. See e.g., Jordan v. Medley, 711 F.2d 211, 213 (D.C. Cir. 1983). Whether an employee acts within the scope of her employment is a fact-based determination properly put to a jury. See e.g., Jordan, 711 F.2d at 213-214.

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[2] J & R also maintains that Rhone does not apply to cases involving intentional discrimination. However, courts have often applied Rhone to hold taxicab companies liable for the intentional acts of drivers. See e.g., Floyd-Mayers, 732 F.Supp. at 244 (Rhone estops taxicab company from denying liability for discrimination under § 1981); Tarman, 205 F.2d at 705 (taxicab company vicariously liable for intentional assault of driver under Rhone).

It is undisputed that Mehmood was engaged in the business of driving a cab that evening, and that his cab was available for hire when Plaintiffs attempted to contract for Mehmood's services. See June 20 Tr. at 27. This evidence, together with the totality of Mehmood's acts and interactions with Plaintiffs that night, could easily lead a reasonable jury to conclude that Mehmood was acting within the scope of his employment.

D. The Punitive Damages Award was Proper.

1. The Evidence Supports an Award of Punitive Damages.

Defendant J & R maintains that the evidence presented was insufficient to support an award of punitive damages, and advances two arguments in support of that proposition.

a. Mehmood acted with Reckless Indifference.

J & R's first argument is that there was insufficient evidence showing that Mehmood acted with "malice" or "reckless indifference" to Plaintiffs' federally protected rights. See 42 U.S.C. § 1981a(b)(1). This standard is met upon a showing of discrimination "in the face of a perceived risk that [a defendant's] actions will violate federal law." See Kolstad v. American Dental Association, 527 U.S. 526, 536 (1999).

There was ample evidence supporting a reasonable jury's conclusion that Defendant Mehmood acted with reckless indifference to Plaintiffs' rights. First, Plaintiffs produced overwhelming evidence of Mehmood's

discriminatory conduct. Kolstad, 527 U.S. at 538 (egregious acts or behavior support finding of reckless indifference); Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 17-18 (1st Cir.1999) (acts of intentional discrimination are the sort of conduct punitive damages aim to deter). For example, Plaintiffs presented evidence that Mehmood initially offered taxicab service to Silva, who is white, but then tried to drive off without him upon realizing that Bolden, who is black, would also be a passenger. June 19 Tr. at 94:15-22. In particular, Bolden testified that Mehmood drove away when he saw him, dragging Silva through the intersection. Id. Plaintiffs further testified that Mehmood repeatedly stated that he would take Silva as a passenger but not Bolden. Id. at 97:18-23, 147:4-5.

Second, Plaintiffs showed that Mehmood knew his conduct was unlawful. See Kolstad, 527 U.S. at 536-538 (conscious wrongdoing satisfies liability for punitive damages). For example, they offered evidence that Mehmood knew, through his D.C. Taxicab Commission training and in other ways, that taxicab discrimination was illegal. See June 20 Tr. at 28:20-29:8, 32:18-33:21; Trial Ex. 2. Further, Plaintiffs showed that Mehmood hid his taxicab identification card when he realized Bolden was attempting to write down his name and card number. See June 19 Tr. at 101:17-25, 102:1-5, 148:9-13. They also presented evidence that Mehmood refused Plaintiffs' request to stop his cab upon seeing the presence of a police car on Wisconsin Avenue. Id.

at 99:2-5, 100:4-6, 147:22-25, 148:1-4.

In view of all this evidence, a reasonable jury could have easily concluded that Mehmood acted with reckless indifference to Plaintiffs' federally protected rights.

b. J & R Ratified Mehmood's Conduct.

J & R's second major argument challenging the sufficiency of the evidence is that Plaintiffs did not establish J & R's liability for Mehmood's discriminatory conduct. J & R is vicariously liable for damages if it approved or ratified Mehmood's conduct. Kolstad, 527 U.S. at 542 (punitive damages proper where principal ratified or approved the act of agent).

Plaintiffs offered evidence from which a jury could reasonably infer that J & R ratified Mehmood's conduct. For example, they showed that J & R failed to discipline or investigate Mehmood subsequent to his discriminatory conduct. June 19 Tr. at 195; June 20 Tr. at 62-63; see Jordan, 711 F.2d at 217 (employer's inaction subsequent to misconduct supports inference of ratification); Pendarvis v. Zerox Corp., 3 F. Supp.2d 53, 57 (D.D.C. 1998)(failure to investigate is evidence supporting punitive damages award).

Further, Plaintiffs established that J & R has been recklessly indifferent to the lawfulness of its drivers' conduct in the past. See e.g., Rogers v. Ingersoll-Rand Co., 971 F. Supp. 4, 11 (D.D.C. 1997)(punitive damages proper because defendant company willfully

disregarded plaintiffs' rights and failed to ensure safety for other employees); Szwast v. Carlton Apartment, 102 F. Supp.2d 777, 781 (E.D. Mich. 2000)(reckless disregard for housing rights of prospective tenants warrants punitive damages). For example, J & R has consistently failed to: respond to complaints about drivers in the past, June 19 Tr. at 184, 187; inform its drivers of their legal obligation not to discriminate, June 20 Tr. at 30; provide any training to its drivers, June 18 Trial Tr. at 181; and monitor the conduct of its drivers, including the areas to which they take passengers. June 20 Tr. at 61.

Considered in its totality, the foregoing evidence supports a reasonable jury's conclusion that J & R authorized and ratified Mehmood's conduct.

2. The Punitive Damages Instruction was not Erroneous.

Defendant J & R also argues that the Court's jury instruction on punitive damages was erroneous.[3] In particular, J & R contends that the

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[3] The jury instruction on punitive damages provided in relevant part:

> If you find in favor the Plaintiffs and against the Defendants on their race discrimination claims, and if you find by a preponderance of the evidence that the Defendant's conduct was malicious, or was recklessly indifferent to Plaintiff's rights, then in addition to any other damages to which you find the Plaintiffs entitled you may, but you are not required, to award Plaintiffs an additional amount as punitive damages, if you find it appropriate to punish the

(continued...)

Court should have provided supplemental instructions on the meaning of "reckless indifference" and "malice."

As discussed above, J & R did not raise this objection at any time during trial or during the jury instruction conference. Consequently, the Court considers it waived. Further, the "reckless indifference" and "malice" language contained in the jury instruction is found in 42 U.S.C. § 1981(a)(b)(1)[4] and is consistent with the standards set forth in Kolstad. Defendant has cited no authority for the proposition that the Court committed error by not, sua sponte, supplying additional instructions.

Finally, the instruction provided sufficient guidance to the jury on the proper use of punitive damages. The instruction expressly indicated that punitive damages were not required, but could be awarded at the jury's discretion, for the purpose of punishing Defendant or deterring similar conduct in the future. See e.g., BMW of North America, Inc. v. Gore, 517 U.S. at 568 (punitive damages properly imposed to punish unlawful conduct and deter its repetition).

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[3](...continued)
Defendants or to deter the Defendants and others from like conduct in the future.

[4] Section 1981a(b)(1) provides in relevant part: "A complaining party may recover punitive damages if. . .the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

Accordingly, the Court concludes that the jury instruction on punitive damages was not legally erroneous.

3. The Punitive Damages Award was not Excessive.

J & R argues that the $45,000 in punitive damages awarded to each Plaintiff was excessive. A court should not set aside a damage award unless it is "so unreasonably high as to result in a miscarriage of justice" or is "so great as to shock the conscience." Langevine v. District of Columbia, 106 F.3d 1018, 1024 (D.C. Cir. 1997).

It cannot be said that the jury's award was unreasonably high. First, Plaintiffs presented evidence suggesting that J & R acted in reckless disregard of the civil rights of its passengers, including Plaintiffs. See e.g., BMW, 517 U.S. 559 (1996) (reprehensibility of conduct a factor in determining reasonableness of award). As explained above, the evidence revealed that J & R consistently failed to train its drivers on their duty not to discriminate, June 19 Tr. at 181, June 20 Tr. at 30; failed to keep records of or monitor its drivers, June 20 Tr. at 61; failed to establish procedures for handling passenger complaints, June 19 Tr. at 184, 187; and failed to investigate or discipline Defendant Mehmood in any way after learning of his discriminatory conduct. June 20 Tr. at 62-63.

Furthermore, J & R argues that the $90,000 punitive damages award is excessive because it is substantially larger than the compensatory award of $6,000. See e.g., BMW, 517 U.S. at 580 (punitive damages must

bear a reasonable relationship to compensatory damages). However, because cases involving non-economic harm, such as this one, frequently result in low awards of compensatory damages, a high ratio of punitive-to-compensatory damages is justified.[5] See Gore, 517 U.S. at 538 (setting aside a 500-1 ratio of punitive-to-compensatory damages, but noting that "A high ratio [of punitive to compensatory damages] may [] be justified in cases in which the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine.").

The Court cannot say that a combined total of $90,000 in punitive damages, which the jury determined was necessary to punish J & R for its actions and to deter similar conduct in the future, was so unreasonable as to result in a miscarriage of justice. Courts have upheld punitive damage awards for non-economic injuries that have been much more substantial than the $45,000 awarded each Plaintiff in this case. See e.g., Johansen v. Combustion Eng'g Inc., 170 F.3d 1320, 1338 (11th Cir. 1999)(affirming a punitive to actual damage ratio of 100 to 1 because it was necessary to deter a "pollute and pay" policy); Deters v. Quifax Credit Information Services, 202 F.3d 1262, 1273 (10th Cir. 2000)($295,000 punitive damage award, where punitive to actual damages

[5] Plaintiffs made no effort to inflate their compensatory damages by claiming long-lasting emotional or physical injuries. Instead, they conveyed to the jury the anger, frustration, and helplessness they felt as they saw their right to equal treatment blatantly violated.

ratio was 59 to 1, was reasonable to deter employer's discriminatory conduct). Accordingly, given the reprehensibility of J & R's conduct, the small amount of compensatory damages awarded to Plaintiffs, the non-economic, but significant injury suffered, and the strong interest in deterring similar conduct in the future, the Court concludes that $90,000 in punitive damages is not excessive.

III. Conclusion

Defendant J & R Incorporated's Motion for Judgment and Motion to Amend or Alter Judgment [#32] is **denied**. An Order will issue with this Opinion.

_____ _____
Date Gladys Kessler
United States District Judge

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O R D E R

This matter is before the Court on Defendant J & R Incorporated's Motion for Judgment and Motion to Amend or Alter Judgment [#32]. Upon consideration of the motion, opposition, reply, and the entire record herein, for the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED, that Defendant's Motion is **denied**.

_____
Date

_____
Gladys Kessler
United States District Judge

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